83-429

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

CRAIG M. DAVIS,

Petitioner,

—VS—

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

Once a court adopts the provisions and orders examinations pursuant to a Sex Offender's statute which provides non-prison disposition alternatives, including treatment at a mental hospital, due process entitles the defendant to a full hearing regarding his disposition pursuant to that statute, and failure to provide such a hearing is a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

When such a statute provides for a full hearing only upon a recommendation of in-patient psychiatric treatment and not upon any of the alternative recommendations, that statute creates a capricious classification unconstitutional under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

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OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 190 Conn. 327 (1983) and appears as Appendix A. The sentencing opinion appears as Appendix B.

JURISDICTION

The final judgment of the Supreme Court of the State of Connecticut was entered on June 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) and the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution; the statutes involved are Connecticut General Statutes Section 17-244 and 245. They are as follows:

Amendment [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Sec. 1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 17-244. Certain convicted persons to be examined. Report and recommendation

(a) Except as provided in section 17-255 any court prior to sentencing a person convicted of an offense for which the penalty may be imprisonment in the Connecticut Correctional Institution at Somers, or of a sex offense involving (1) physical force or violence, (2) disparity of age between an adult and a minor or (3) a sexual act of a compulsive or repetitive nature, may if it appears to the court that such person is mentally ill and dangerous to himself or others, upon its own motion or upon request of any of the persons enumerated in subsection (b) of this section and a subsequent finding that such request is justified, order the commissioner to conduct an examination of the convicted defendant by qualified personnel of the institute. Upon completion of such examination the examiner shall report in writing to the court. Such report shall indicate whether the convicted defendant should be committed to the diagnostic unit of the institute for additional examination or should be sentenced in accordance with the conviction. Such examination shall be conducted and the report made to the court not later than fifteen days after the order for the examination. Such examination may be conducted at a correctional facility if the defendant is confined or it may be conducted on an outpatient basis at the institute or other appropriate location. If the report recommends additional examination at the diagnostic unit, the court may, after a hearing, order the convicted defendant committed to the diagnostic unit of the institute for a period not to exceed sixty days, except as provided in section 17-245 provided the hearing may be waived by the defendant. Such commitment shall not be effective until the director certifies to the court that space is available at the diagnostic unit. While confined in said diagnostic unit, the defendant shall be given a complete physical and psychiatric examination by the staff of the unit and may receive medication and treatment without his consent. The director shall have authority to procure

all court records, institutional records and probation or other reports which provide information about the defendant.

(b) The request for such examination may be made by the state's attorney or assistant state's attorney who prosecuted the defendant for an offense specified in this section, or by the defendant or his attorney in his behalf. If the court orders such examination, a copy of the examination order shall be served upon the defendant to be examined.

(c) Upon completion of the physical and psychiatric examination of the defendant, but not later than sixty days after admission to the diagnostic unit, a written report of the results thereof shall be filed in triplicate with the clerk of the court before which he was convicted, and such clerk shall cause copies to be delivered to the state's attorney and to counsel for the defendant.

(d) Such report shall include the following: (1) A description of the nature of the examination; (2) a diagnosis of the mental condition of the defendant; (3) an opinion as to whether the diagnosis and prognosis demonstrate clearly that the defendant is actually dangerous to himself or others and requires custody, care and treatment at the institute; and (4) a recommendation as to whether the defendant should be sentenced in accordance with the conviction, sentenced in accordance with the conviction and confined in the institute for custody, care and treatment, placed on probation by the court or placed on probation by the court with the requirement, as a condition to probation, that he receive outpatient psychiatric treatment.

§ 17-245. Disposition of defendant after report

(a) If the report recommends that the defendant be sentenced in accordance with the conviction, placed

on probation by the court or placed on probation by the court with the requirement, as a condition of such probation, that he receive outpatient psychiatric treatment, the defendant shall be returned directly to the court for disposition. If the report recommends sentencing in accordance with the conviction and confinement in the institute for custody, care and treatment, then during the period between the submission of the report and the disposition of the defendant by the court such defendant shall remain at the institute and may receive such custody, care and treatment as is consistent with his medical needs.

(b) If the report recommends confinement at the institute for custody, care and treatment, the court shall set the matter for a hearing not later than fifteen days after receipt of the report. Any evidence, including the report ordered by the court, regarding the defendant's mental condition may be introduced at the hearing by either party. Any staff member of the disagnostic unit who participated in the examination of the defendant and who signed the report may testify as to the contents of the report. The defendant may waive the court hearing.

(c) If at such hearing the court finds the defendant is not in need of custody, care and treatment at the institute, it shall sentence him in accordance with the conviction or place him on probation. If the court finds that such person is in need of outpatient psychiatric treatment, it may place him on probation on condition that he receive such treatment. If the court finds such person to be mentally ill and dangerous to himself or others and to require custody, care and treatment at the institute, it shall sentence him in accordance with the conviction and order confinement in the institute for custody, care and treatment provided no court may order such confinement if the report does not recommend confinement at the insti-

tute. The defendant shall not be subject to custody, care and treatment under this part beyond the maximum period specified in the sentence.

THE STATEMENT OF THE CASE

The material facts are as follows: On January 21, 1982 Craig Davis was sentenced to 10 to 20 years in prison for the following crimes: Kidnapping in the 2nd Degree in violation of Section 53a-94(a) (Class B Felony, maximum term not to exceed 20 years); Sexual Assault in the 1st Degree in violation of Section 53a-70(a) (Class B Felony, maximum term not to exceed 20 years); and Robbery in the 3rd Degree in violation of Section 53a-136(a) (Class D Felony, maximum term not to exceed 5 years). In each sentence, the sentence imposed was the maximum allowed by law. The offense underlying these charges is that of having sexually molested a 10 year old boy.

Craig, who is 21, had a long history of psychological problems. Therefore, on June 18, 1981, the defendant served the State's Attorney with a notice of intent to plead the insanity defense pursuant to Connecticut General Statutes Section 53a-13. Various extensions of time were granted to permit the defendant to submit medical reports. These reports confirmed the seriousness of Craig's psychological problems, but the physicians found that "These influences do not appear to rise to the level of significantly diminishing his capacity either to appreciate the wrongfulness of his behavior or to conform it to the law."

Upon receipt of this report, the defendant withdrew his insanity plea and pleaded nolo contendere under the Alford Doctrine (see below). Instead, because of the high probability that Craig's crime was impelled by psychological tensions, his counsel requested, under Connecticut General Statutes 17-244 et seq, a psychological evaluation and diagnosis by the Whiting Forensic Institute prior to the sentencing. At the same time, the defendant moved to plead under the Alford Doctrine. The court granted both motions. The defendant pleaded nolo contendere

under the Alford Doctrine, and the court ordered the psychiatric examination.

Connecticut General Statutes 17-244 applies only to prisoners who may be committed to the Connecticut Correctional Institute at Somers, Connecticut's maximum security facility, and to those who have committed certain particularly serious sex offenses. The clear intent of the statute is twofold: To determine the dangerousness of the prisoner to himself and others (which would justify certain types of restrictive confinement) and to determine whether in-patient or out-patient psychiatric treatment would be preferable to imprisonment (presumably either as a more promising mode of treatment or a less restrictive alternative or both). The statute requires a hearing if the report recommends in-patient treatment but not for any of the other alternatives available under the statute.

The report from the Whiting Forensic Institute was received by defendant's counsel on January 21, 1982, the day before the hearing. The reporters stated that:

> "In summary, the clinical picture based on interview, history, and a review of historical/collateral data reveals no evidence to suggest that Mr. Davis is experiencing a major mental illness of psychotic proportions. While he clearly has exhibited difficulties over the years, the evidence suggests that these difficulties have been the result of a personality disorder.
>
> With reference to the referral issue, the present examination provides no evidence of the need for additional diagnostic assessment and/or in-patient treatment at a mental health facility at this time. It is therefore, the opinion of these examiners that this young man does not meet the statutory criteria for commitment (under C.G.S. 17-244a)."

The report made no finding as to Craig's dangerousness, as required by the statute, nor did it address any of the other alternatives made available under the statute.

Because of the failure to address these issues, at the next day's sentencing hearing, defendant's counsel requested a one week continuance which would allow him to call witnesses to refute the conclusions and opinions in the report regarding the defendant's suitability for alternative commitment under the statute. The request was denied. Instead, the court sentenced Craig to a full prison term. The court also stated:

> "As best I can impose the following recommendation and if the commissioner will treat it as an instruction I would be grateful: That he be given psychiatric counseling and treatment and that he be housed at Whiting if that's possible, but the sentence is nonetheless no less than 10, no more than 20 years to serve."

At no time did the defendant have the opportunity to address or question the contents and conclusions of the report in any meaningful manner.

Following sentencing, the defendant was transported to the Connecticut Correctional Institute at Somers. A Motion to Reopen Judgment was filed January 29, 1982 claiming, among other things, that the defendant's due process rights were violated by the court's refusal to grant a hearing on the 17-244 report and disposition and that his equal protection rights were violated by the statute's granting of a hearing upon some recommendations but not upon others. This motion was denied on February 17, 1982. The defendant appealed to the Connecticut Supreme Court on February 1, 1982. The appeal was argued on February 9, 1983 and decided against the defendant on June 14, 1983.

THE RAISING OF FEDERAL QUESTIONS

Violation of the Defendant's Due Process Right to a Hearing.

The question of the defendant's due process right to hearing on his possible disposition under the sentencing statute Connecticut General Statute 17-244 and 245 was first raised at the

sentencing hearing where defendant's counsel asked for a continuance in order to provide time to call witnesses on the defendant's behalf. At that time, defendant's counsel stated,

> "You ruled and on 17-245 obviously the defendant does not waive the hearing under 17-245; I know that the Statute is inconsistent in my belief anyway." (tr. p. 40)

Later he added,

> "All rights of appeal will be reserved within the statute, if Your Honor please." (tr. p. 43)

The due process question was then formalized and argued in the appeal:

> "Although the statute does not mandate a hearing if there is not a recommendation for confinement the case law above cited certainly mandates a hearing when sentencing persons under a statute such as this." Appellant's brief p. 30.

The Connecticut Supreme Court addressed this due process issue and held that the State's decision as to where to assign a convict is not subject to audit under the due process clause, 190 Conn. 327 at 338, and that no constitutionally protected liberty interest was implicated by lack of a hearing.

Violation of the Equal Protection Clause of the Fourteenth Amendment.

At the sentencing hearing, defendant's counsel asserted,

> "the Statute is inconsistent in my belief anyway." (tr. p. 40)

This objection of inconsistency was formalized in the appeal to the State's Supreme Court.

> "Where a Full Hearing is Not Mandated by the Statute, the Failure to Mandate a Full Hearing is a Capri-

cious Classification Which Requires that the Statute Failing to Mandate a Full Hearing for the Defendant be Held Unconstitutional.

In Section 17-244 of the Connecticut General Statutes, set out above, section (d) of said statute provides 'If the report recommends confinement at the institute for custody, care and treatment, the court shall set the matter for a hearing not later than 15 days after receipt of the report. . . .' Section (c) provides 'If the court finds that such person is in need of outpatient psychiatric treatment, it may place him on probation on condition that he receive such treatment.'

There is no provision for a mandated hearing if the report recommends that confinement at the institute for custody, care and treatment is not recommended.

This is an invidious distinction and violates the constitution of the United States, Amendment Fourteen."

The Connecticut Supreme Court addressed the issue and ruled that because the distinction established by the statute was founded on a rational basis, no equal protection rights were violated. 190 Conn. 342.

I. ARGUMENT

I. The Defendant Has a Due Process Right to a Hearing When Unlitigated Statutorily Created Issues Relating to the Sentencing are Before the Court.

The defendant's due process right to a hearing rests on three claims, all well-supported by law.

A. When a statute creates distinct issues requiring new findings of fact, as well as alternative sentencing possibilities, a hearing is required to allow full examination of those issues.

Specht v. Patterson, 386 U.S. 605, 609, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967).

> "The case is not unlike those under recidivist statutes where an habitual criminal issue is 'a distinct issue' (Graham v. State of West Virginia, 224 U.S. 616, 625, 32 S.Ct. 583, 56 L.Ed. 917) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' Oyler v. Boles, 368 U.S. 448, 452, 82 S.Ct. 501, 504, 7 L.Ed.2d 446; Chandler v. Fretag, 348 U.S. 3, 8, 75 S.Ct. 1, 99 L.Ed. 4. Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed."
>
> See also *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 1862, 68 L.Ed.2d 270 (1981).

Here, distinct issues were raised relating to the defendant's dangerousness and to psychiatric condition as opposed to penal confinement. The defendant had a right to be heard on these issues.

B. Although sentencing procedures may not always require the full panoply of due process protections, once a liberty interest is affected or if a liberty interest is, as here, created by statute, certain due process rights adhere, in order to ensure that the state-created right is not arbitrarily abrogated.

Wolff v. McDonnell, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

Thus, once a statute creating alternatives to a prison sentence for certain kinds of offenders is brought into the sentencing process by the court, the defendant is entitled to full consideration of those alternatives.

Cameron v. Mullen, 387 F.2d 193, 202 (D.C. Cir. 1967); *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

C. Such consideration can only be achieved through a hearing allowing the opportunity for cross examination and rebuttal

by defendant's counsel. "Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of a criminal proceeding at which he is entitled to effective assistance of counsel."

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

As Gardner and other cases make explicit, what makes counsel's assistance effective is his ability to probe and challenge the materials presented to the court.

Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690.

"It is precisely '(t)he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings."

Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 1265, 63 L.Ed. 552 (1980).

"Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel."

Kent v. United States, 383 U.S. 5461, 86 S.Ct. 1045, 1057, 16 L.Ed. 84 (1966).

A sentencing disposition which includes consideration of statutorily created alternatives involving unlitigated issues is such a critically important decision here. It is particularly critical where, as here, the defendant has pleaded under the Alford Doctrine because in this situation there has been no prior determination of guilt by the court or jury, and the sentencing hearing is the only hearing the defendant will receive.

II. A Statute Which Allows a Hearing When In-Patient Psychiatric Treatment is Recommended but not Otherwise, Deprives the Defendant of Equal Protection of the Laws.

A large body of law confirms the defendant's right to hearing when a court's decision may subject him to psychiatric confinement against his will, even when he is already under criminal sentence.

Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 1265, 63 L.Ed. 552 (1980).

These decisions have two apparent bases: that psychiatric confinement is a significantly different mode of confinement than imprisonment, *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), and that psychiatric imprisonment is in some sense more stigmatic than penal confinement.

This second rationale is obsolete. Legislatures and courts are becoming increasingly enlightened to the view that psychiatric confinement is not per se stigmatic but that the most humane alternative for prisoners with psychiatric disorders is that which provides the most effective mode of disposition and treatment. The District of Columbia Circuit Court intelligently puts forward this reasoning in its discussion of the District's Sexual Psychopath Act. "The Sexual Psychopath Act . . . was intended to be a humanitarian alternative to punishment for mentally disturbed potential sexual offenders who, some thought, could not be civilly committed and who, under the M'Naghten Rule than in effect, could not even plead 'insanity' to criminal charges arising from their uncontrollable misconduct."

Cross v. Harris, 418 F.2d 1095, 1098 (D.C. Cir. 1969).

This situation is precisely that of the defendant. More important, it is clear that Section 17-244 is designed to provide for this kind of situation. It requires an initial determination of the defendant's dangerousness followed by a conclusion as to the most suitable type of disposition or treatment.

Having provided for these alternative sentencing modes, the law must require equal consideration of all the alternatives. As written, only the prisoner whom the doctors declare to be suitable for in-patient psychiatric treatment gets that consideration. It is denied to all others, including the psychologically disturbed person like Craig Davis for whom the optimal disposition may well be out-patient treatment but regarding whom no opinions were given as to either dangerousness or the suitability of out-patient treatment. (It is noteworthy that the court made its own finding of dangerousness, a finding which counsel

had no opportunity to argue against, and blatantly based its sentence primarily on that unsupported finding.) Thus, Craig Davis was not provided the benefit of the statute provided for those found by the psychiatrists to be sufficiently sick to require in-patient treatment, and thus he was denied consideration of what might have been a more appropriate remedy.

A second reason for giving alternative methods of treatment the same consideration and due process protections as in-patient disposition, at least in sex offender cases, is that the prime purpose of disposition in these cases has to be curative. It does not serve the public good to have a person imprisoned for ten years with minimal treatment and then released, perhaps uncured and certainly at even greater odds with his or her society, when, as was suggested by medical authorities in this case, lesser alternatives might also prove more effective cures.

The other rationale for a hearing when a court's disposition may subject a defendant to psychiatric confinement—that it is a significantly different form of disposition—is equally valid in reverse. Prison, mental hospitalization, and out-patient treatment are fundamentally distinct. Once a court agrees under a specific statute to consider evidence regarding comparative suitability of these alternatives, *Baxstrom*, (supra), requires that any distinction in the mode of consideration have relevance to the purpose for which the classifications are made. Since the "stigma" of mental incarceration can no longer be considered greater in an enlightened society than penal incarceration, no rational basis remains for allowing a hearing in one case but not the other.

In *Leach v. United States*, 320 F.2d 670 (D.C. Cir. 1963), a court had imposed a maximum penalty on a defendant without responding to his request for a mental examination. The appellate court commented:

> "In the act of sentencing, the judge approaches the attribute of the Almighty—he sits in judgment of his fellow man. At that moment he must determine the penalty which society will impose on the offender for his crime. But more importantly, for the offender and

> for society, in sentencing, the judgment must consider a program of rehabilitation designed to preclude, so far as current learning can furnish a guide, a repetition of the crime. To this end the Congress has placed several aids at the disposal of the sentencing judge to assist him in making his awful decision." 320 F.2d at 672.

The court remanded the case for reconsideration of the sentence with the remark that "Further consideration generally may provide a more appropriate means for protecting the interests of society and the appellant." 320 F.2d at 673.

In Craig Davis' case, the sentencing judge did not fully consider the sentencing alternatives but accepted the psychiatric report without allowing it to be scrutinized and in spite of its omission of some of the statutory mandates. It went on to deny the hearing which would have been provided had the report recommended in-patient treatment. By this denial of his right to be heard, the defendant was denied the equal protection of the law which would have granted such a hearing under indistinguishable circumstances.

SUMMARY OF ARGUMENT AND CONCLUSION

1. The final judgment of the Supreme Court of the State of Connecticut was entered on June 16, 1983.

2. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) and the Fifth and Fourteenth Amendments to the United States Constitution.

3. The statutory provisions of the Connecticut General Statutes are C.G.S. 17-244 and C.G.S. 17-245.

4. Connecticut General Statutes apply to the petitioner as the petitioner is a person who may be committed to the maximum security facility in Connecticut.

5. The statute requires a hearing if the psychiatric report recommends in-patient treatment but not for any other alternative under the statute.

6. The report was received one day before sentencing.

7. The report failed to address the issues of the dangerousness to self or community.

8. The petitioner-defendant did not have a meaningful opportunity to address these issues.

9. The petitioner-defendant's due process rights were violated.

10. The petitioner-defendant's equal protection rights were violated.

11. The petitioner-defendant has a due process right to a hearing when unlitigated statutorily created issues relating to the sentencing are before the court.

12. Although sentencing procedures may not always require the full panoply of due process protections, once a liberty interest is affected, certain due process rights adhere.

13. A statute which allows a hearing when in-patient psychiatric treatment is recommended but not otherwise deprives the defendant of equal protection of the laws.

14. For the reasons set forth above, the petitioner urges that the writ of certiorari be granted.

Respectfully Submitted,

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APPENDICES

OPINION OF CONNECTICUT SUPREME COURT

190 Conn 327

State v. Davis

ARTHUR H. HEALEY, J. On December 8, 1981, the defendant, Craig Davis, entered a plea of nolo contendere to one count of second degree kidnapping in violation of General Statutes § 53a-94(a), one count of first degree sexual assault in violation of General Statutes § 53a-70(a) and one count of third degree robbery in violation of General Statutes § 53a-135(a). The Superior Court, *McKeever, J.*, accepted Davis' plea on that date. At the time of entering his plea, Davis also filed a motion, pursuant to General Statutes § 17-244,[1] to be examined at the

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[1] General Statutes § 17-244 provides: "(a) Except as provided in section 17-255 any court prior to sentencing a person convicted of an offense for which the penalty may be imprisonment in the Connecticut Correctional Institution at Somers, or of a sex offense involving (1) physical force or violence, (2) disparity of age between an adult and a minor or (3) a sexual act of a compulsive or repetitive nature, may if it appears to the court that such person is mentally ill and dangerous to himself or others, upon its own motion or upon request of any of the persons enumerated in subsection (b) of this section and a subsequent finding that such request is justified, order the commissioner to conduct an examination of the convicted defendant by qualified personnel of the institute. Upon completion of such examination the examiner shall report in writing to the court. Such report shall indicate whether the convicted defendant should be committed to the diagnostic unit of the institute for additional examination or should be sentenced in accordance with the conviction. Such examination shall be conducted and the report made to the court not later than fifteen days after the order for the examination. Such examination may be conducted at a correctional facility if the defendant is confined or it may be conducted on an outpatient basis at the institute or other appropriate location. If the report recommends additional examination at the diagnostic unit, the court may, after a hearing, order the convicted defendant committed to the diagnostic unit of the institute for a period not to exceed sixty days, except as provided in section 17-245 provided the hearing may be waived by the defendant. Such commitment shall not be effective until the director certifies to the court that space is available at the diagnostic unit. While confined in said diagnostic unit, the defendant shall be given a complete physical and psychiatric examination by the staff of the unit and may receive medication and treatment without his consent. The director shall have authority to procure all court records, institutional records and probation or other reports which provide information about the defendant.

"(b) The request for such examination may be made by the state's attorney

Whiting Forensic Institute. This motion was granted by the court, and sentencing was postponed until after the institute had filed its report with the court.

The sentencing hearing was held on January 22, 1982. The report from the institute was received by Davis' counsel on January 21, 1982, one day before the hearing. The report concluded that "the present examination provides no evidence of the need for additional diagnostic assessment and/or in-patient treatment at the mental health facility at this time. It is, therefore, the opinion of these examiners that this young man [Davis] does not meet the statutory criteria for commitment (under C.G.S. 17-244[a])." At the hearing, Davis requested that sentencing be continued for one week in order to bring in the two people who signed the report from the Whiting Forensic Institute as well as a doctor from the Yale Psychiatric Center who had treated Davis. Davis' counsel stated to the court that he had planned to bring these three people to the hearing but was unable to do so because the report was only received the day before, leaving him no time to contact the individuals. The state objected to the request for a continuance on two grounds. First, it claimed that the report was unequivocal in its opinion, rendering it unnecessary to have a hearing. It claimed further that there was no authority under the statute to conduct such a hearing. The court, *Ment, J.*, denied the request for a continu-

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or assistant state's attorney who prosecuted the defendant for an offense specified in this section, or by the defendant or his attorney in his behalf. If the court orders such examination, a copy of the examination order shall be served upon the defendant to be examined.

"(c) Upon completion of the physical and psychiatric examination of the defendant, but not later than sixty days after admission to the diagnostic unit, a written report of the results thereof shall be filed in triplicate with the clerk of the court before which he was convicted, and such clerk shall cause copies to be delivered to the state's attorney and to counsel for the defendant.

"(d) Such report shall include the following: (1) A description of the nature of the examination; (2) a diagnosis of the mental condition of the defendant; (3) an opinion as to whether the diagnosis and prognosis demonstrate clearly that the defendant is actually dangerous to himself or others and requires custody, care and treatment at the institute; and (4) a recommendation as to whether the defendant should be sentenced in accordance with the conviction, sentenced in accordance with the conviction and confined in the institute for custody, care and treatment, placed on probation by the court or placed on probation by the court with the requirement, as a condition to probation, that he receive outpatient psychiatric treatment."

ance without stating its grounds. After hearing a number of witnesses for both the state and the defendant testify as to the most appropriate sentence, the court imposed a total effective sentence of not less than ten nor more than twenty years to serve.

On February 1, 1982, Davis appealed his sentence to this court. On the same day, he moved in the trial court to reopen judgment and for reasonable bail pending appeal. The defendant alleged four grounds in the motion to reopen: the court's previous refusal to grant a continuance; the court's acceptance of the report from the Whiting Forensic Institute, when the report made no mention in its recommendation regarding the appropriateness of outpatient care as mandated by General Statutes § 17-244; the court's failure to hold a hearing on the report pursuant to General Statutes § 17-245,[2] which mandates such a hearing when confinement is recommended; and, finally, the

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[2] General Statutes § 17-245 provides: "(a) If the report recommends that the defendant be sentenced in accordance with the conviction, placed on probation by the court or placed on probation by the court with the requirement, as a condition of such probation, that he receive outpatient psychiatric treatment, the defendant shall be returned directly to the court for disposition. If the report recommends sentencing in accordance with the conviction and confinement in the institute for custody, care and treatment, then during the period between the submission of the report and the disposition of the defendant by the court such defendant shall remain at the institute and may receive such custody, care and treatment as is consistent with his medical needs.

"(b) If the report recommends confinement at the institute for custody, care and treatment, the court shall set the matter for a hearing not later than fifteen days after receipt of the report. Any evidence, including the report ordered by the court, regarding the defendant's mental condition may be introduced at the hearing by either party. Any staff member of the diagnostic unit who participated in the examination of the defendant and who signed the report may testify as to the contents of the report. The defendant may waive the court hearing.

"(c) If at such hearing the court finds the defendant is not in need of custody, care and treatment at the institute, it shall sentence him in accordance with the conviction or place him on probation. If the court finds that such person is in need of outpatient psychiatric treatment, it may place him on probation on condition that he receive such treatment. If the court finds such person to be mentally ill and dangerous to himself or others and to require custody, care and treatment at the institute, it shall sentence him in accordance with the conviction and order confinement in the institute for custody, care and treatment provided no court may order such confinement if the report does not recommend confinement at the institute. The defendant shall not be subject to custody, care and treatment under this part beyond the maximum period specified in the sentence."

court's imposition of the sentence which he claimed, under the present state of the record, amounted to cruel and unusual punishment. On February 17, 1982, a hearing on the matter was held.

In regard to the motion to reopen the judgment, the defendant claimed then for the first time that the Whiting report did not comply with the requirements of the statute because it did not make any recommendation regarding the propriety of ordering that Davis be placed on probation.[3] The defendant went on to claim that this failure constituted a denial of his due process rights. He also claimed then for the first time that his due process rights had been violated by the trial court's refusal to grant a continuance in order to have a hearing on the recommendation contained in the report filed by the institute. Finally, he claimed, also for the first time, that the statute violated his constitutional rights because General Statutes § 17-245 allegedly allowed the state to remonstrate against the report, without making a similar provision for the defendant. After the state noted its objection to the motion to reopen, again based upon the unequivocal nature of the report, the court asked both parties whether they wished to address the issue of the court's authority to reopen the matter. Counsel for the defendant replied that "under the general authority in the Superior Court, any judgment may be reopened within a reasonable period of time." The court then denied the motion to reopen the judgment. Davis amended his preliminary statement of issues so as to include this decision.[4]

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[3] At the hearing on February 17, 1982, Davis' counsel stated that the failure of the report to comply with the statute "was the plain thrust of my sentencing argument." A fair reading of the transcript of the sentencing hearing, however, indicates that this claim was never brought to the attention of the trial court. The basis for the defendant's request for a continuance was not to enable the examiners at the Whiting Forensic Institute to prepare a report that complied with the statute. Rather, the only basis for the request was to bring in the examiners from the institute as well as a doctor from the Yale clinic.

[4] In his amended preliminary statement of the issues, Davis also included the trial court's denial of his motion for reasonable bail pending appeal. The trial court, however, reserved decision on this motion. The record does not indicate any action taken by the court in regard to this matter. Furthermore, although the claim was included in the defendant's brief as part of his "Statement of Issues," it was never addressed in the body of the brief. Therefore, it will not be considered.

On appeal, the defendant has briefed two issues.[5] As stated by the defendant, the first issue is whether "due process requires that at the time of sentencing, the accused be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross examine and to offer evidence of his own." Although not stated explicitly, it is evident from the defendant's brief, as well as from that of the state, that the defendant has included in this issue the claimed failure of the report to make a recommendation regarding probation.[6] The second issue briefed by the defendant is whether "the failure [of General Statutes § 17-245(b)] to mandate a full hearing is a capricious classification which requires that the statute ... be held unconstitutional." Finally, we note that the "due process provisions of the federal [U.S. Const., amend. XIV § 1] and Connecticut [Conn. Const., art. I § 8] constitutions have a common meaning so as to permit us to treat the questions on appeal as a single issue." (Citations omitted.) *State* v. *Pickering*, 180 Conn. 54, 55 n.1, 428 A.2d 322 (1980).

Prior to considering the merits of the defendant's claims, we must review the procedural posture in which this case has come before us. Specifically, we must address the authority of the trial court to reopen the judgment in this case.

We begin by noting that pursuant to Practice Book § 3063, this court is not bound to consider any claim unless it was distinctly raised in the trial court. The only claim made at the time of sentencing on January 22, 1982, was the court's refusal to grant a continuance in order to hold a hearing on the report filed by the Whiting Forensic Institute. No constitutional basis for this hearing on the Whiting report was advanced at that time. Furthermore, there is no statutory requirement that such

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[5] The issue of whether the sentence imposed amounted to cruel and unusual punishment has not been briefed by the defendant and is considered abandoned. *State* v. *Daniels*, 180 Conn. 101, 104, 429 A.2d 813 (1980); *Burritt Mutual Savings Bank* v. *Transamerica Ins. Co.*, 180 Conn. 71, 82n, 428 A.2d 333 (1980).

[6] The defendant has also raised for the first time on appeal three other defects in the report. Because these alleged defects were not raised in the trial court, we will not consider them. Practice Book § 3063.

a hearing be held. Therefore, the trial court did not err in refusing to grant a continuance to hold this hearing.

The first time the issues briefed in this appeal were brought to the attention of the trial court was at the hearing on the motion to reopen the judgment on February 17, 1982. No authority was cited by the defendant as to the trial court's authority to act at that time. Rather, at the hearing, counsel for the defendant merely alluded to "the general authority in the Superior Court...." Overlooked by both parties is the fact that there are two Practice Book rules on point. Section 934 provides: "At any time during the period of a definite sentence, the judicial authority may, after a hearing and for good cause shown, reduce the sentence or order the defendant discharged or released on probation, or on a conditional discharge for a period not to exceed that to which he could have been sentenced originally." Section 935 provides: "The judicial authority who sentenced the defendant may, within ninety days, correct an illegal sentence or other illegal disposition, or he may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

The sentence imposed by the trial court in this case was not illegal. Pursuant to General Statutes §§ 53a-35 and 53a-37, the length of the sentence was within the permissible range for the crimes charged. See *Green* v. *Warden*, 178 Conn. 634, 639, 425 A.2d 128 (1979); *State* v. *Kreminski*, 178 Conn. 145, 153, 422 A.2d 294 (1979); *State* v. *Willliams*, 173 Conn. 545, 558, 378 A.2d 588 (1977); compare *State* v. *Campbell*, 180 Conn. 557, 429 A.2d 960 (1980); *Salsbury* v. *Robinson*, 30 Conn. Sup. 144, 305 A.2d 286 (1972); *Wiggins* v. *Robinson*, 30 Conn. Sup. 54, 299 A.2d 189 (1972); *Liberti* v. *York*, 28 Conn. Sup. 9, 246 A.2d 106 (1968). Because the sentence was not illegal, the court's authority to reopen the judgment was limited by the application of Practice Book § 934. That section permits the trial court, in its discretion, to reduce or modify the sentence[7] only after the

[7] Although the defendant entitled his motion as a "Motion to Reopen Judgment," we find Practice Book § 934 controlling. First, "[i]n a criminal case the imposition of sentence is the judgment of the court." *State* v. *Nardini*, 187 Conn. 109, 123, 445 A.2d 304 (1982), citing *State* v. *Moore*, 158 Conn. 461, 463, 262 A.2d 166 (1969). It is the sentence, therefore, and not the acceptance

defendant has shown good cause for taking such action. This court will find reversible error, therefore, only if it can be demonstrated that it was an abuse of discretion to find that the standard had not been met in this case.

Although "good cause" might have been shown if the defendant had established that the sentencing proceedings on January 22, 1982, violated his constitutional rights, we cannot conclude that any such violation occurred in this case. Therefore, we affirm the decision of the trial court.

The fourteenth amendment provides, in part, "nor shall any State deprive any person of life, liberty or property, without due process of law...." The interest at stake in the present proceeding is Davis' liberty interest. There are two elements which must be established in order to find a due process violation. First, because not every liberty interest is protected, Davis must establish that he has a liberty interest that comes within the ambit of the fourteenth amendment. *Hewitt* v. *Helms*, U.S. , 103 S. Ct. 864, 869, 74 L. Ed. 2d 675 (1983); *Meachum* v. *Fano*, 427 U.S. 215, 223-24, 96 S. Ct. 2532, 49 L. Ed. 2d 451, reh. denied, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Society for Savings* v. *Chestnut Estates, Inc.*, 176 Conn. 563, 571, 409 A.2d 1020 (1979). If it is determined that a protected liberty is implicated, then the second element that must be addressed is what procedural protections are "due." *Goss* v. *Lopez*, 419 U.S. 565, 577, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); *Board of Regents* v. *Roth*, supra, 569-70; *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); see *Williams* v. *Bartlett*, 189 Conn. 471, 477, 457 A.2d 290 (1983). Finally it should be noted that the due process clause only prevents the state from acting in derogation of a protected interest. *Vitek* v. *Jones*, 445 U.S. 480 489, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980); *Meachum* v. *Fano*, supra, 224; *Wolff* v. *McDonnell*, 418 U.S. 539,

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of his plea which the defendant seeks to "reopen." Furthermore, as has been noted, the trial court imposed a legal sentence. Therefore, although the defendant sought to "reopen" the sentence, the only relief available was a reduction or a modification of that sentence. These are the remedies provided in Practice Book § 934.

557, 94 S. Ct. 2963, 41 L. Ed.2d 935 (1974). It is significant that this defendant, unlike the individuals seeking relief in such cases as *Vitek*, *Meachum* and *Wolff*, is not the focus of any *involuntary* deprivation of a right, but rather is himself *voluntarily* seeking the benefit of the statute.

"Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the states." *Hewitt* v. *Helms*, supra, citing *Meachum* v. *Fano*, supra. We will consider first whether Davis has a liberty interest protected by the due process clause. It is important at this juncture to note the narrowness of the issue presented because of the circumstances of this case. In determining whether Davis has a liberty interest arising from the due process clause, the issue that must be resolved is whether a defandant, following a valid conviction, has a constitutional right to be sentenced to a particular type of facility. We hold that he does not.

The United States Supreme Court has specifically stated that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons." (Emphasis in original.) *Meachum* v. *Fano*, supra, 224; see also *Vitek* v. *Jones*, supra, 493; *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60: L.Ed. 2d 668 (1979). Although the specific claim that a convicted defendant has a right to be placed in a mental hospital has not been analyzed

under the language quoted from *Meachum*,[8] we believe that the reasoning employed by the court is determinative of this claim. The only limitation placed upon the state in confining a defendant in its prison system is that "the conditions of confinement [must] not otherwise violate the Constitution."

Meachum v. *Fano*, supra. No such claim has been made here; therefore, the state is empowered "to confine him in *any* of its prisons."[9] (Emphasis in original.) Id.

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[8] In *Johnston* v. *State*, 152 Ga. App. 133, 262 S.E.2d 161 (1979), the court rejected a claim that a trial court's refusal to place a defendant convicted of a sex offense in a facility where he could receive psychiatric treatment was cruel and unusual punishment which violated the defendant's eighth amendment rights. In *Canfield* v. *State*, 506 P.2d 987 (Okla. Crim. App.), appeal dismissed, 414 U.S. 991, 94 S. Ct. 342, 38 L. Ed. 2d 230 (1973), reh. denied, 414 U.S. 1138, 94 S. Ct. 884, 38 L. Ed. 2d 763 (1974), the court held that no constitutional rights were implicated where a defendant was sentenced to a facility without psychiatric treatment services, because the decision as to where to place prisoners was a legislative determination.

[9] The cases cited in the defendant's brief which purportedly support the proposition that Davis was entitled to a hearing are inapposite because they do not address the issue raised in this case. In *Baxstrom* v. *Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. ed. 2d 620 (1966), the state was seeking to have a defendant committed to a mental hospital at the expiration of his criminal sentence without the jury review available to all other persons civilly committed in New York. The court held tha such a procedure violated the defendant's rights under the equal protection clause of the fourteenth amendment. Id., 111. On this issue, therefore, this case stands for the principle that a defendant who is being involuntarily committed after serving his term, in which case the state no longer has a penal interest, has a right to procedural protections. In contrast, Davis is voluntarily seeking to be committed as an alternative to serving a prison sentence. There is no affirmative state action involved and no additional sentence being imposed.

Likewise, *Specht* v. *Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), is another case in which the state was seeking to impose a potentially greater sentence than could be imposed based upon the crime with which the defendant had been convicted. The only prerequisites was that the trial court find the defendant to be an habitual offender and mentally ill. Id., 607. The defendant was convicted for indecent liberties under a statute carrying a maximum sentence of ten years. He was sentenced, however, pursuant to a sex offenders act, which carried an indefinite sentence from one day to life. Id. The court held that the issue of whether the defendant qualified as a sex offender was a distinct issue to which due process protections attached. Id., 610. Once again, in the present case, the state is not seeking to impose an additional penalty or to incarcerate the defendant under a different statute from that under which he was convicted; rather, Davis is voluntarily seeking alternative treatment. This also distinguishes the case of *State* v. *Warren*, 169

The second source from which a liberty interest can arise is the law of a particular state. *Hewitt* v. *Helms*, supra. In the present case, Davis is seeking to be committed to the Whiting Forensic Institute or to be placed on probation so that he may receive outpatient therapy as an alternative to being sentenced to prison pursuant to General Statutes §§ 17-244 and 17-245. The determination of whether Davis' protected liberty interest has been implicated requires a showing that these statutes create a right to either alternative or a justifiable expectation that one of these alternatives would be afforded him. *Vitek* v. *Jones*, supra, 488-89; *Meachum* v. *Fano*, supra, 226-27; *Wolff* v. *McDonnell*, supra, 557. We hold that General Statutes §§ 17-244 and 17-245 do not create such an interest.

In *Vitek* v. *Jones*, supra, the court distinguished two types of statutes. The first involved the Nebraska statute under consideration there which *prohibited* the transfer of a prisoner from a prison to a mental hospital without a finding that the defendant was suffering from a mental illness for which he could not secure adequate treatment in the correctional institution. In this type of statute the court held that a justifiable liberty interest was created. The second type of statute was that found in *Meachum*

Conn. 207, 363 A.2d 91 (1975), cited by the defendant.

In *Lynch* v. *Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962), the court was faced with a statute which permitted a trial court automatically to confine a defendant to a hospital for the mentally ill if he is found not guilty by reason of insanity. The court held that where a defendant objects to the introduction of evidence regarding his sanity, if he is thereafter found not guilty by reason of insanity, he is then entitled to the procedures afforded a person being civilly committed. Id., 711. On this issue, therefore, this case stands for the proposition that to commit a person who insists that he is sane is, in effect, an involuntary commitment requiring procedural protections. It is not a case, as here, where the defendant is voluntarily seeking commitment after he has been convicted.

Finally, the two remaining cases cited by the defendant present no constitutional issues. In *Cross* v. *Harris*, 418 F.2d 1095 (D.C. Cir. 1969), the court specifically stated: "We have not ... here ... decided any constitutional questions." Id., 1101. It, therefore, provides no support for the defendant. In *Leach* v. *United States*, 320 F.2d 670 (D.C. Cir. 1963), the court only held that the trial court abused its discretion by not ordering a psychiatric examination which was requested by the defendant and which was statutorily authorized. Id., 672-73. It did not hold that once the report was completed the defendant had any right to be placed in a particular type of facility.

v. *Fano*, supra, which left the decision to transfer prisoners to other facilities in the *discretion* of the prison authorities. In *Meachum*, because the prison authorities were empowered with a discretionary determination, no justifiable expectation could arise. Id. We find the latter situation to be applicable to the particular statutes under consideration.

General Statutes § 17-244 permits a defendant to request that he be examined at the Whiting Forensic Institute. General Statutes § 17-244(a). It also mandates that, after such a request is made and an examination performed, a report making a particular reommendation be filed with the trial court. General Statutes § 17-244(c), (d)(4). Neither of these steps, however, gives a defendant a "justifiable expectation" that the trial court will follow the recommendation of the Whiting report. This is because General Statutes § 17-245 accords the trial court the discretion of whether or not to accept the recommendation. In effect, the report provides a sentencing aid to the court.

In summation, because no constitutionally protected liberty interest was implicated by the trial court's refusal to grant the defendant's request for a hearing on the report filed by the Whiting Forensic Institute, we hold that Davis was not deprived of any constitutional right. Therefore, we cannot conclude that, pursuant to Practice Book § 934, the trial court abused its discretion in not granting the defendant's motion to reopen the judgment.

In addition, we cannot find that the claimed failure of the report to comply with the statutory requirements is sufficient to meet the "good cause shown" standard of § 934.[10] As noted previously, the only claimed defect in the report that is properly before us is its failure to include a recommendation regarding the alternative of sentencing the defendant to a period of pro-

[10] Because the defendant first raised the lack of statutory compliance at the hearing on the motion to reopen, we need not address the issue of whether a report must follow the requirements of the statute verbatim. This is because the crucial issue presented at the hearing on February 17, 1982, was not whether the report ritualistically followed the requirements of the statute; rather, that issue was whether there was "good cause" under Practice Book § 934 to reopen the judgment.

bation. Our examination of the Whiting report discloses that the opinion of the examiners was that the defendant should be sentenced in accordance with the conviction. See General Statutes § 17-244(d)(4). Furthermore, the transcript of the sentencing hearing makes it clear that the trial court, which had the ultimate decision regarding sentencing, did not think probation was appropriate. The court stated: "there is no question that [Davis] must be incarcerated, no question whatsoever.... There was a statement ... which struck me and that was that no matter how much counseling and treatment [Davis] may receive the doctor could not accurately predict whether or not he would repeat this terrible offense. For that reason alone, if for no other, he must be incarcerated." Under the circumstances, we cannot find that the defendant demonstrated "good cause" to modify his sentence. Therefore, the court did not abuse its discretion.

The final issue to be addressed is the defendant's claim that General Statutes § 17-245(b) establishes a "capricious classification." This is based on the fact that the statute requires a hearing before the defendant is confined to Whiting, while not making any provision for a hearing where the report concludes that there is no basis for confinement. We have held that no liberty interest is implicated by sentencing Davis to serve his time in a correctional institution rather than at Whiting. Furthermore, Davis has not alleged that fundamental or suspect classifications are involved in the decision. Therefore, the "legislaiton will withstand constitutional attack if the distinction [established by the statute] is founded on a rational basis." *Laden* v. *Warden*, 169 Conn. 540, 543, 363 A.2d 1063 (1975); see also *Leech* v. *Veterans' Bonus Division Appeals board*, 179 Conn. 311, 313, 426 A.2d 289 (1979); *Liistro* v. *Robinson*, 170 Conn. 116, 124, 365 A.2d 109 (1976).

In *Vitek* v. *Jones*, supra, the court noted that confinement in a mental hospital entails "more than a loss of freedom from confinement." Id., 492. Because of the different nature of the confinement, the court held that the constitution required a hearing before the state could transfer a defendant from a correctional facility to a mental hospital. Id. The purpose of this

hearing was to protect the defendant from the "stigmatizing consequences" of a transfer to a mental hospital. The same rationale can be found in General Statutes § 17-245(b). The sole purpose of the hearing provided for in that section is not, as the defendant claims, to give the state the opportunity to remonstrate against the recommendation—although the state is entitled to do that. Rather, the provision for a hearing protects the statute from constitutional challenge which might otherwise arise if the state were permitted to confine a defendant involuntarily to Whiting without a prior hearing.

The considerations involved when a defendant is not going to be confined are totally different and justify the omission of holding any hearing. As we have noted, in this latter situation, a valid conviction extinguishes the defendant's right to be free from confinement and entitles the court or the state to place him in any of its prisons. *Meachum* v. *Fano*, supra. We hold that General Statutes § 17-245(b) creates a rational classification designed as much to aid the defendant as it is to protect the rights of the state.

There is no error.

In this opinion PETERS, PARSKEY and GRILLO, JS., concurred.

SHEA, J. (concurring). I agree with the result and the essential holding of the court that the absence of any provision for a hearing to afford an opportunity for a defendant to contest a recommendation against commitment at the Whiting Forensic Institute in the report of the examining psychiatrists made pursuant to General Statutes § 17-244 does not violate any constitutional right. Since General Statutes § 17-245(b) makes a recommendation for confinement at the institute a prerequisitie for a commitment there, the denial of the defendant's request for a continuance to bring in the examining psychiatrists for the purpose of disputing their recommendation was not an abuse of discretion.

I disagree, however, with the portion of the court's opinion which indicates that Practice Book § 934 rather than Practice

Book § 935 provides the appropriate vehicle for remedying a deficiency in the sentence which has been imposed. Section 935 is not limited to the correction of an "illegal sentence or other illegal disposition," as the court assumes, but also authorizes correction within ninety days of sentences or other dispositions "imposed in an illegal manner." Practice Book § 935. The claim of error based upon the denial of the defendant's request for a continuance is essentially a claim that the sentence was "imposed in an illegal manner" by virtue of a procedural impropriety and is plainly cognizable under § 935. The nonconformity of the report with the requirements of § 17-244(d), which the defendant also relied upon, was also a claimed violation of a sentencing procedure requirement and would qualify for consideraton under § 935. Because the deficiencies in the report were not raised at the sentencing hearing, however, the defendant must be deemed to have waived them and the court did not err in refusing to reopen the judgment when the defendant later called them to its attention.

As both grounds upon which the defendant seeks relief in this appeal may be regarded as asserting that the sentence was "imposed in an illegal manner," § 935 was clearly applicable. I have no overwhelming concern about the pristine integrity of the rules of practice, but I am disturbed by the precedent being set in using the "good cause" standard for modification of a sentence in § 934 to attack the legality of a sentence. Section 934 allows modification of a sentence only by reducing it or ordering the defendant discharged or released on probation or on a conditional discharge. It presupposes a valid sentence to be modified. Unlike § 935, which requires any sentence correction to be made within ninety days, a limitation which the defendant in this case had met, § 934 allows modification at "any time during the period of a definite sentence." To allow § 934 to be employed for the purpose of considering claims which are cognizable uner § 935 defeats the purpose of the provision limiting the time for seeking correction of a sentence alleged to be illegal. In my view, we have no need for this new avenue of post-conviction attacks upon judgments in addition to the right of appeal and the habeas corpus remedy.

SENTENCING OPINION

27,812	SUPERIOR COURT
STATE OF CONNECTICUT	JUDICIAL DISTRICT OF FAIRFIELD
vs.	AT BRIDGEPORT
CRAIG M. DAVIS	JANUARY 22, 1982

SENTENCING

BEFORE:

HONORABLE AARON MENT, *Judge*

APPEARANCES:

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MR. MACO: Craig Davis stands before the Court for sentencing as a result of pleas to a three count information: Kidnapping second degree, Sexual Assault first degree and Robbery third degree. He is represented by Attorney Bingham. The pleas were entered before Judge McKeever on December 8, 1981.

Your Honor has a Presentence Investigation Report. On September 15, 1980 as indicated in the Presentence Investigation Report the ten year old victim of this offense was riding his bicycle in the area of Roxbury School, town of Stamford. The victim was at that location as a result of arriving home from school that afternoon, informing his mother there was going to be a baseball game at the school and he wished to attend that game. The young boy left his home at approximatley 4:15, 4:30 that afternoon, went to the location of Roxbury School where there was, in fact, a game in progress, along with a young friend of his. They went to a location of a wooded area adjacent to that baseball field where there were some sand piles where they were riding their bikes when the first occasion they confronted the defendant, Craig Davis, at that time to have a conversation with both boys relative to their bicycles and at one point after the initial conversation left that location and subsequently returned to that location confronting again the ten year old victim indicating that there was a bicycle within the wooded area and asking if he would accompany him, the ten year old would accompany the defendant into that wooded area. The ten year old was lured into that area as a result of the fact that he had just been the victim of a stolen bicycle so the ten year old victim went into that area with the defendant.

Upon entering that wooded area the victim was given the orders by the defendant that: You're going to be mugged, words to the effect that you're going to be robbed. At that point the ten year old victim was then thrown to the ground, his jacket was removed, his pants were taken down and the acts of oral intercourse and anal intercourse were performed upon this ten year old victim by the defendant. During the course of this incident the defendant, who was armed with masking tape bound the eyes, mouth, feet, arms of this ten year old victim. Taken

from the ten year old victim was the sum of, I believe, 75¢ and a watch that belonged to the ten year old victim's brother.

At one point during the commission of these offenses and included in these offenses are allegations that the ten year old boy was, in fact, struck in the face by the defendant. During the course of this incident the defendant at one point had the arrogance to give orders to the young boy that he was to remain at this location that the defendant was going to leave for a short period of time, the victim was not to leave until the defendant, in fact, gave him instructions that he was free and would, in fact, be able to leave. The defendant left for a short period of time, came back to that location, found his victim still bound and gagged and praised the young victim for the fact that he had not made any attempt to leave at that time.

At some point during that period of time the young victim indicates that he was able to hear his young friends return with others, evidently looking for him. At that point the young victim was in the presence of the defendant. The defendant placing his hand over the victim's mouth telling him to be quiet and not to say anything until those people left. After the area was cleared the defendant left the scene and told the young victim that he knew where he lived and that if anything was said he would be back, he would be back to kill him.

The young victim was able to free himself from the masking tape, got on his bicycle and rode off. He was sighted by his aunt who at that time had been summoned along with other members of the family by the mother and father to make a search for the young boy when he did not return home at 6:30. The aunt saw the boy, the victim, and described him as in a state of shock, still having fragments of the masking tape on his hands and body. The young boy was brought home by his aunt and was examined by his family doctors.

Community effort then took place as to gathering information as to who this perpetrator was. A meeting took place the following day at the Roxbury School and descriptions were given to members of the Stamford Police Department which matched the description of an individual who is around that area that

matched the description of that given by the victim and also the name of Mr. Davis emerged as a person who resembled that description as to the identification of the perpetrator. Mr. Davis was then summoned at his home where he was living at in Darien with some friends of the family and arrived at the Police Station, I believe, the following day, the 16th of September and gave a statement in detail as to his commission of this offense and specifically as to the nature of the sexual assault, the robbing and the physical assault upon this ten year old victim.

Perhaps it's needless to say, perhaps not necessary to say, but I feel it should be said for the record that, in term, this assault is a vicious, a brutal, a barbaric perhaps an animalistic physical assault upon a young individual of our community. While it's noted in the Presentence Investigation Report that the physical injury perhaps has healed upon this ten year old, that most definitely the psychological, the mental damage that has been done to this ten year old has not yet been determined and perhaps for quite some period of time won't be fully determined or evaluated.

I can say that I have spoke with the ten year old victim and I have spoke with the mother and the father of this individual and in my evaluation it has, in fact, harmed, damaged the mental attitude of this ten year old individual and has, in fact, inflicted mental and physical harm upon the victim's mother and father.

I can say that throughout this prosecution the mother and father and the young victim have maintained a true sense of dignity and restraint with regard to this matter.

What is particularly troublesome to the court is with regard to the offender's version. Mr. Craig Davis states he was incompetent at the time, he was not sane. "I did not know what I was doing. I didn't know the wrongfulness of the crime."

Well, I reviewed medical reports that had been supplied by the defense and I find no medical support to corroborate the statements of the defense with regard to the fact that this boy, this individual did not understand what he was doing at the time. In fact, the evidence that the State intended to prove, and

that is as to the observations by the victim of the defendant at the time of the commission of the crime, as to his manner of speech, his manner of walk, the fact that the victim understood what the defendant was saying to him, observations by the citizens who were in the area at the time of the alleged incident in that Roxbury School baseball game, there was no indication that either through some mental disorder or through the result of substance abuse that this individual did not have the mental faculties to, in fact, commit and know what he was doing when he committed this crime.

In addition when the defendant gave a statement to the Police Department the following day he was particular with regard to each of the aspects of the crime. In fact, he had the mental ability to know after he took the watch from the young boy to go back to that Darien house and, in fact, to stash that watch in one of his drawers and, in fact, to remove the clothing that he had worn when he committed the crime.

He's also credited by the police with some further questioning. When Mr. Davis volunteered information that he, in fact, had to get high before committing the assault, because he needed it to bolster his courage to do that act. That seems to be the only indication from the words of Mr. Davis that, in fact, he evidently was involved in some substance abuse. Again, there is no other information, either medical or physical observations supporting that allegation.

The fact that this man had the faculty to commit the crime, had the mental ability to commit the crime, knew what he was doing, is also bolstered by the fact that there was a degree of preparation with regard to the commission of this crime to the extent that when police questioned Mr. Davis about the masking tape used to tie up the victim and as to where he had the tape and when did he take the tape with him Mr. Davis stated that he had the masking tape in his car, that he took the masking tape and placed it in his jacket pocket prior to getting out of the car; as that shows what he had in mind prior to the assault and that he had planned prior to the assault to use the tape on his victim.

These are the facts the State would have established to negate any contention that this individual did not have the mental capability to commit the crime or, in fact, to know what he was doing when he committed those assaults. The bottom line with regard to these observations and the bottom line as a result of medical reports that have been furnished is that this individual did, in fact, have a free will, he had an ability to mek a choice on September 15, 1981 when he made that choice and the choice was to abduct this young boy, to sexually assault this young boy, to rob this young boy, in fact, to threaten this young boy with his life should he say anything about this assault to anyone.

When I spoke to the victim and to the victim's family I told them at the outset I won't be so presumptuous to tell them I knew what they were going through. I don't think anyone could know the full impact not only of that assault, but ultimately perhaps more importantly the fact that this man threatened that he would return to this young boy if in fact he said anything. I know for a fact the victim and his family have been living with that constantly and in fear of that since the day of that assault until the present time.

I think perhaps the most persuasive plea I could make to the Court for a lengthy period of incarceration would simply be to attempt to paraphrase the bottom line of a number of letters which I am sure have been received by this Court from not only the family but, I believe, from other members of the community urging that the Court remove this individual from the community for a lengthy period of time. I found them to be most sincere and poignant letters with regard to the representations of the feelings they felt to the Court and I think the bottom line of those letters and those requests are to get this individual out of the community for the benefit of the community so that this individual does not have an opportunity again to prey on children of the community, specifically as for the victim of this crime, that ten year old individual. Get this individual, the defendant, out of the community for a lengthy period of time, a period of time in which that young victim can grow up knowing that this individual, this person that committed that crime upon

him, will not return to do him any harm, or attempt to do him any harm until he's a grown man, until he has an opportunity to defend himself.

Accordingly, the State would request that the Court consider imposing a prison term of not less than 12½ years no more than 25 years in State's Prison, that sentence to be effectively served. I make this request in consideration of the nature of the crime, the harm that was inflicted upon the victim, the protection of the community, for a detriment to any future conduct on the part of this individual and also any individual who would think of taking advantage in our community of a helpless individual. I would like to inform the Court at this time that in the courtroom are the mother and father of the ten year old victim. I know it's within the discretion of the Court if they wish to say anything to hear them. I only make representation at this time.

THE COURT: Mr. Maco, I believe you already know that I would welcome any remarks by one or both of the parents of the victim.

MR. MACO: I'm aware of that, your Honor.

THE COURT: Do you, in fact, know whether either of them or both of them wish to say anything?

MR. MACO: I don't know, your Honor. I just make that request at this time.

THE COURT: Mr. and Mrs. Bellanzano (Phonetic Spelling) you have that opportunity. Either of you or both of you wish to say anything? You certainly may do so at this time.

MRS. BELLANZANO: I do. Sixteen months ago my son left the house to attend a Little League game. At that time he was a happy, normal, well adjusted, carefree ten year old. Later that evening he was found terrified and hysterical after having been assaulted sexually, physically and psychologically. He's never been the same since. This crime has left an affect upon our whole family, not just David and nothing can undo the wrong that's been done but I do feel that it will help my son tremendously if he knows that the person who did this to him is locked

up and will be for a long time. He did threaten to come back and kill my son; he's lived with that ever since. My son said that he would like to have the guy put away until he's grown so he'll have a chance to protect himself. He knows that he as a child is defenseless against someone who is twice his age, strength and size. The man has entered his plea of guilty on all counts and I feel he should be dealt with severely under the law. If you sentence him to the recommendation of the State, 12½ to 25 years, then you will be putting him away from society, especially the children in society, and you'll give my son the peace of mind he so badly needs. That's all I want to say.

THE COURT: Thank you. Did you want to say anything?

MR. BELLANZANO: No, that about covers it, your Honor.

THE COURT: Thank you. Mr. Bingham?

MR. BINGHAM: Yes, your Honor. As your Honor knows, I have a request to begin with. I requested and Judge McKeever granted my motion, that Mr. Davis be examined pursuant to Section 17-244(a) as your Honor knows, which has to do with sentencing as far as disorder is concerned and if the Whiting-Forensic Institution recommended it your Honor would be able to—of course the sentence is in the Court's discretion—be able to sentence, if you thought that was proper, to the Whiting-Forensic Institute or in the alternative if the Whiting-Forensic Institute suggested a probationary period or out-patient treatment the Court could also sentence the defendant to a probationary period.

I have just received a report from the Whiting-Forensic Institute and I quote to your Honor the last sentence which says that ". . . confined in the Institute for custody, care and treatment or placed on probation by the Court or placed on probation with the requirement as a condition of probation that he receive outpatient psychiatric treatment. . . ." Yesterday I received a report from the Whiting-Forensic Institute and they stated in their report that Mr. Davis is—that they have no evidence to suggest that Mr. Davis is—experiencing a major medical illness of psychotic proportions; while he clearly has exhibited difficul-

ties over the years, the evidence suggests that these difficulties have been the result of a personality disorder. It is therefore the opinion of these examiners that this young man does not meet the statutory criteria for committment under 17-244(a). I had planned to call the psychiatrist and the doctor, however, there was no time since I got the report yesterday and your Honor received the report from me—actually I do not believe you received it from Whiting and I don't believe the State's Attorney received it from Whiting and I would request that the sentencing be continued for one week to produce these two witnesses and a doctor from the jail psychiatric clinic.

THE COURT: Mr. Maco, do you want to comment on Mr. Bingham's request that the sentencing be continued for one week?

MR. MACO: The State, of course, would object to any continuance with regard to the sentencing. I've reviewed the letter from the diagnostic team. I think they are unequivocal with regard to their opinion that the defendant does not meet the statutory criteria for committment under 17-244(a) and I think in view of that unequivocal statement by the diagnostic team that really no hearing is called for under the Statute. If, in fact, the letter came back indicating that this defendant was in need of further examination perhaps then under the Statute a hearing could, in fact, be held, but I see no authority under the Statute for a continuance simply to have these doctors come down to testify as to what seems to be an unequivocal decision.

THE COURT: Request is denied, Mr. Bingham.

MR. BINGHAM: I'd like to take this up in the order of medical history. As your Honor knows we have waived a jury trial in this case. Secondly, Mr. Craig Davis pleaded guilty under the Alford Doctrine, which I believe shows consideration to the victim in this case. It would have been, no question about it, traumatic for the victim to have testified. The victim now being 11 years old, the victim then being ten years of age. I believe that Mr. Davis has shown consideration and his family has shown consideration that they did not wish that the victim have to testify again, recount the facts again, restate what hap-

pened on that date. Secondly, Mr. Davis gave a full and complete statement to the Police Department, indicating a form of remorse. I do not believe that at any period in this time, contrary to what the State's Attorney has stated, has Mr. Craig Davis shown anything but remorse for the victim or has his family shown anything but remorse for the victim.

Since the incident occurred Mr. Davis has been on bail and he has entered into a course of treatment. The course of treatment, I believe, has been successful, your Honor has seen the report that Yon Ton Sokol (Phonetic Spelling) has given us, your Honor, and that was dated February 20, 1981 and he indicated that Mr. Davis with a long term treatment, three to ten years, prognosis is good. "It must be emphasized that intensive individual psychotherapy over the next several continuous years is necessary to sustain that prognosis. As to a specific prediction whether or not he will repeat the alleged acts it is hard to assess accurately. It appears that these acts have occurred when Craig is under extreme stress due to personal circumstances. They have not occurred repeatedly, but should Craig be under similar stress in the future he may repeat the act; with successful psychotherapy the chance would be significantly decreased. He's presently in a two time per week program of individual therapy and it's only in a very early stage and Craig has been constantly involved; but for change to occur this involvement must be maintained over several years."

I received a follow-up report which indicates the "diagnosis remains unchanged, borderline personality, prognosis improves as Craig becomes more involved in treatment and functions well in his life. With successful treatment is it unlikely that the similar act would be repeated." So you see, your Honor, that for a six month period the psychiatrist at the center for psychotherapy shows improvement and as a matter of fact Mr. Davis has been on bail—well, he was in jail for approximately a week—but since the time of the incident has gone consistently for psychotherapy, has been treated and has shown improvement. He also has been gainfully employed, he is now living at home with his parents and he has given up the use of mind altering drugs, whether it be alcohol or any form of drug other than

alcohol. So it indicates to me, your Honor, that Mr. Davis is remorseful, that Mr. Davis intends to seek treatment for his psychiatric disorder. It's hard for me to understand how these two psychiatrists could say that there is no evidence to suggest Mr. Davis is experiencing any major mental illness when they received the reports.

Of major importance, your Honor, is a report which I have submitted to the Court from the Yale Psychiatric Clinic—correct that—Yale University School of Medicine, Department of Psychiatry. It appears—and this is a lengthy report which I won't repeat in full because I believe your Honor has read it in full, it's attached to the probation report, the probation report incorporates the report of Dr. Young in full as explaining the problem in this particular case—it appears that Mr. Davis' problems began in 1964 when he was three years of age. He sustained a skull fracture in an accident while his father was driving the family car. He was treated in the Albany Center Hospital. His E.E.G. was moderately abnormal at that particular time.

Throughout the years Mr. Davis has received certain psychiatric treatment, he was seen by a Dr. Glass, P.H.D. in '65, one year after the accident at the age of four years and ten months out of concern for the partial visual impairment and worsening of his speech. There was also suggested a behavior instability at that particular time and was treated by Dr. Glass. Dr. Glass at that time saw his client's development as rather precarious with a predisposition for adjustment problems, and suggested a speech evaluation. He was then referred to the Child Study Center in January of 1967 and treated there for a year beginning in May. His problems were aggressive behavior at home and at the Kindergarten. Craig was described as overly solicitous towards his infant brother.

There was a second application made to the Child Study Center in 1972 but was not completed.

At the age of 13 Craig's father and family moved to Stamford as Craig's father is a minister in the Methodist Church and he was assigned to Stamford. In Stamford he began weekly therapy with a Dr. William Higgins a psychologist in Westport. That

therapist reported considerable improvement in his cooperative behavior.

Craig reported to Dr. Young that not long after he had troubles with a certain scout master, that the relationship became somewhat tense at home after Mr. Davis returned from Florida. Then a Dr. Young recites the charges which your Honor has before him and fully well knows what they are.

Mr. Davis has had great difficulty since the time he has been arrested and has been out on bail. Dr. Young recites that Mr. Davis was in consultation with Dr. Irwin Potwitz (Phonetic Spelling) for psychiatric evaluation. He also recites Dr. Sokol's report which I've read to your Honor.

Shortly after release on bond Mr. Davis found work as a security guard and began working toward a class 1 driver's license which he presently has. Craig has occasionally dated during the past years and he has continually worked since the time of his release on bail.

Craig has mentioned being approached once or twice during the past year by a male homosexual who says "I know what you did"; then the latter backed off when Craig refused.

Mr. Davis is also suffering by reason of this—and we can only describe it as the State's Attorney describes it as being a—horrendous act, I don't think anybody disputes that and I believe that Mr. Davis is suffering also along with the victim. Craig's relationship with his father has improved and I believe that part of the problems if you Honor, pleases, which resulted in the acts were a result of some form of tension between Craig and his family and that's recited in the Presentence Report as some form of tension between Craig and his older brothers. P.S.I. also indicates that Craig's older brothers are scholastically inclined and are in school. I think Craig has a difficulty in understanding that possibly he is not so scholastically inclined and further that it is no problem as far as the family is concerned because he is not going to graduate from college and whereas the rest of the family may well graduate from college. His father is a graduate and as a minister and an attorney at law in the

State of Massachusetts; his mother has her master's degree in education; so you can see he comes from a well educated family with urgings toward education, maybe at times overurgings. Maybe the parents should have recognized the fact that Craig was not a student.

Dr. Young concludes that, "While it can be said that the incident leading to Mr. Davis' charges was indeed influenced by such factors as the above," which he recites and your Honor has the complete report before him,—". . . his influences do not appear to rise to the level significantly diminishing his capacity to appreciate the wrongfulness of his behavior or conform it to the law."

Now, the question remains, your Honor, what do we do with Craig Davis? How do we protect society? How do we use the instrument of the law not to destroy two people? Mr. Davis and the victim of this particular incident. I've submitted to your Honor a list of recommendations from—on behalf of Mr. Davis. I've also given them to Mr. Maco the State's Attorney and you can see the general gist of these is that Mr. Davis is always a gentleman, ". . . he was a great help to me. He seems to be a sincere man in his determination to do right" and that's from a Maria Avate (Phonetic Spelling). There is a report from a dentist, his family physician, Mr. Abbazia, that's signed by all of the family, including children age 17, 22 and 15. It concludes by saying: ". . . we are truly sorry for this horrible incident and also asking for help and hope, we all join in that hope and pray that Craig will not be penalized by imprisonment but will be helped by whatever sentence you decide to impose." And that is directed to your Honor.

The rest of the letters, one from Mr. William Adams, one from Miss Bassler are of the same indication. There is also a letter, your Honor, from a Sidney Bingham, who is of no relation of mine, and he indicates that his son went to school with Craig and ". . . I hope that I can be of some help. I would like to help Craig in any manner possible," and he again indicates that, ". . . it seems to me that treatment is the proper course that should be taken in this case and not incarceration."

There is one from an Ellis Carpenter. There is one from an attorney in St. Louis, Missouri, who has known Craig through the years. Mr. Davis' father was born in Canton, Ohio and he participated in the church and knew the family for many years, knew Mr. Davis. There is a letter from the Associate Pastor of the Concord Trinity Methodist Church: I would suggest that we are now squarely looking at the issue of rehabilitation vs. retribution. Incarceration would indeed satisfy the heart. How can the State afford to supply any kind of ongoing therapy that could be effective as that which he is involved. To interrupt the therapeutic relationship at this time might be extremely damaging. I am hopeful that the Court will take time to see and assess Craig and the other things like him as a human being, to be dealt with justly for the benefit of his future as well as that of society. Mr. & Mrs. Clark. Bruce Daily and one from a Mabel Dunn who is a former teacher of Craig's and taught in the school system: I cannot imagine the changes he, the accused, must feel. It must have been an act of the old Satan, but he could do a good job at the moment. I encourage the Court to be as lenient as possible. Daniel E. Davis. A letter from Mr. Carl DelVecchio indicating that Mr. Davis' veracity is unquestionable, truthfull. "That all the time I knew him, knowing Craig as a young lad and watching him grow, I found nothing unusual in his personality traits. He had a fun loving disposition, was no different than any other young man." A Marjorie Eickenberry, if your Honor, please. There is a Mr. Emanual, all of these letters indicate the same thing, your Honor, that there is no reason to disbelieve Mr. Craig Davis and I will not continue any further as far as these recommendations go, your Honor. Your Honor has them before him. I have a letter from a Rev. Edward H. Holmes who is the district supervisor of the United Methodist Church who states if every possible consideration could be given Craig in light of the fact that this is the first time he's faced criminal charges. Mr. and Mrs. Howard, Mr. Lasso and there is a letter from Franklin Marzullo who is attached to the community of St. Luke and he indicates the same: "I know he comes from an extraordinary family, both parents are loving and caring people. I have seen them demonstrate these qualities often during our long relationship." So you can see, your Honor,

that—and there are people here today who are supporting Craig—he has the support of his family. He has the support of his friends, he has the support of parishioners in his father's church.

Finally, there's a letter from Paula West who says: To Whom it may concern, the People vs. Craig Davis and she states: I am one of the people the Judicial System represents. I am concerned, consequently I'm writing to express my firm support of Craig Davis and to urge you to prescribe just and human treatment. I had an opportunity to observe Craig growing up as a Sunday School student as part of a Christian family. I have known the Davis family for nine years. Craig is quiet, impressionable, polite, soft-spoken. As a citizen of this country and as an active member of the Stamford Community teaching in the school system for 15 years, I am admittedly exposed to the hostile, inhuman environment of a country that negates its responsibility for aiding prisoners, but reinforces psychiatric behavior patterns. He is particularly vulnerable because he is a sensitive young man and powerless. It is my belief we have the opportunity as well as the obligation to assist Craig through beneficial treatment which addresses his particular needs, and she cites from St. John, and I might conclude, your Honor, that I believe the proper solution to this problem—and I know it's your Honor's responsibility to sentence as you believe is just—but we must also remember after listening to the victim, which was a terrible thing to listen to, there's no question—I asked the question myself: What would I do if I were the parents of such a child? I'm sure that I would make a similar speech to the Court—but sometimes it's very hard to see clearly in a situation such as that nature when you are the parents of the victim. I might add that Craig Davis is suffering; his family has suffered; he will continue to suffer, he will suffer it for the rest of his life knowing that he committed this act upon this youth, but he is seeking treatment and we must also remember if we are citing the gospel, we should not take out our vengeance on Craig Davis to what the community believes is the proper treatment.

I believe your Honor, and I've said it many times in the past, and you know my feelings on the subject, that the proper form

of treatment in this particular case is to have Craig Davis be treated in an institution for any personality disorder that he may have.

The psychiatrist at Yale, his own psychiatrist, indicates that there is a personality disorder. We are not denying that there's a personality disorder, that does not mean that Craig Davis is a criminal and should be incarcerated in the State's prison in Somers because he is not the willful criminal that is sentenced here everyday to Somers. He is a young man as the complete record shows is a great deal sensitive, he comes from a good family, it is not a behavioral problem but he needs help; he's crying out for help; he's a voice in the wilderness crying out for society to help him. His family has been unable to help him in the past and he looks to your Honor for some form of help so that he may be cured of this personality disorder and if not completely cured of the personality disorder how many of us in this courtroom have a personality disorder and yet we are not sentenced to Somers State's Prison only because of a personality disorder? I believe that Craig has a useful life ahead of him. I believe that he can serve society now that he realizes that he must seek this treatment and how many times have we seen, if your Honor, pleases, incidents in the past where people make the family put this under the rug, maybe the family thought it wasn't serious enough to give serious attention to; we now know that it is; if Craig had been treated before as intensively as he's being treated now this horrible act may not have been committed.

He has made an application to the United States Army recruiting station and, of course, that application has to await the outcome of this particular proceeding. I therefore urge, and would seriously recommend and suggest to your Honor that serious consideration be given to the treatment of Craig Davis and not to the punishment of Craig Davis. I can see no purpose in incarcerating Craig Davis in the State's Prison in Somers because I do not believe it will serve society. I don't believe that it will necessarily protect the victim. I do not believe that it will in any way help Craig Davis overcome his personality

disorder. I therefore would request that Mr. Davis be sentenced to the Whiting-Forensic Institute on an out-patient basis.

THE COURT: Thank you, Mr. Bingham. Does your client want to add anything?

MR. BINGHAM: I believe he does.

THE DEFENDANT: Yes, your Honor. I feel it is like everything is just got stopped and all, your Honor, ever since I've gotten out of jail on bond, you know, I've been trying to make the best of my life, more than I could say for any criminal that comes in this court. I can't go on.

THE COURT: Mr. Bingham, anything further?

MR. BINGHAM: No. His parents are here. Rev. Davis is here and his mother is here and with your Honor's permission they might wish to address the Court. I know it's up to your Honor to permit them.

THE COURT: I'll extend them an opportunity to speak if they wish to.

REV. DAVIS: First of all with the way that the system is we've never been able, nor has Craig been able to in any way make an apology—an apology is too light a word, beg forgiveness—of the victim in this circumstance, in this incident, this terrible crime. We're the parents of four sons. We know how the parents of the victim must have felt and must continue to feel. We feel this. We know the anger. We know even the hate that must proceed from the victim's family and the little child to Craig, and if there were just some way that we could have even from the beginning extended to them our deep and heartfelt feelings toward them and what the youngster is going through—the first time we had any contact at all is when I saw the corrections' officer trying to reach Craig, the father was going after Craig when he was coming in here with chains. I hope you will forebear me a couple of minutes—

THE COURT: It will be a couple of minutes. We have a long day. I want to extend to you the courtesy but I hope you won't presume on me.

REV. DAVIS: You stop me as you will but you, I'm sure, must understand as a parent to see your son in chains coming into the courthouse; it was a terrible tramatic thing and then an individual tried to reach him. I found out later it was the father of the child, that's the first I knew of who the father was. The first we heard of the name of the parents was here in court when the court reporter very quickly went through the John Doe statements last time when we appeared before Judge McKeever when we learned the full name on and on as the State's Attorney announced the name. What I'm saying is this: To us too a tramatic devastating—you can imagine my position in the community as a pastor of substantial churches, as a pastor who's stood before courts before pleading on behalf of complete strangers suddenly finding myself now dealing with my own son on behalf of a terrible crime. So what we're asking, your Honor, is sympathy, not for us, not for us, we're not looking for sympathy, sympathy goes from our heart to the victim and to the victim's family, that's where sympathy lies; we're begging you, your Honor, for mercy, mercy based on the foundation of understanding that Craig comes from a family who cares, a family that is prepared in all ways to extend itself, to help his—whatever it is that created as the State's Attorney announced a number of animalistic things and he forgot the word Satanic. We've heard a lot of the word "Satanic" in the courts of Connecticut recently and certainly we feel this was a Satanic impulse induced by alcohol and L.S.D. and marijuana and we thought, well, maybe it was because of this childhood injury. We went all through the business of the psychiatric make-ups, and we find it was good news in a way yet it was bad news. He's not psychotic, this was under abusement. I can't understand why the State didn't share it with your Honor. He confessed it before the police, the Stamford Police Department, that there was drug involvement here. So what we're saying then, your Honor, is we're begging simply for mercy.

I mean in this day and age with the struggles that this court is under to pronounce to all of the public that it cannot be pressured by enlightenments and a renaissance spirit coming forth from the bench I think that we need renaissance and

enlightened judges and decisions and in this case I believe firmly that the enlightened and renaissance spirit is not incarceration but rather obviously care and treatment which the State cannot provide.

He has not been in Stamford, he's not been in this State except under the accompaniment of his mother or his father or both. He's not a resident of this State any longer, he hasn't been here since this terrible, horrible thing happened and now presently he is ready and has been since this incident to go on for firm and long-lasting rehabilitation and so we appreciate what the State offers here, this desire for a pound of flesh but your Honor, we believe firmly that the State is not asking just for a pound of flesh but rather they're asking for blood as well. This is a vicious circle, it's sure to be put into effect here if this young man, my son, goes to incarceration.

There's three points that would seem to me important in the experience of the court: Certainly personal experience dictates to the judge, to the person who is deciding the case here of my son. Personal experience demands the knowledge that a person, sex offender has the lowest running in a prison system. My son is going to be having a pound of flesh removed from him everyday of his life by society wherever he goes, whatever relationships he has and all of his dying day he's going to have to cover himself. The second point, your Honor, is I hope that the Court remembers that the professionals as well as the lay-persons, the loved ones of Craig, the persons who know him, and the professionals call for an enlightened and renaissance kind of decision and the third thing is, I believe the third and final point is, I believe the State, through the wisdom of the legislature provides it through 17.224 that instead of incarceration in a terrible event like this, in place of incarceration where the vicious cycle continues, where there's preying upon this young man and, your Honor, in spite of what the State says I cannot resist as a father to say that the picture that is being painted by Mr. Maco and the rest of the State is truly distorted. The viewpoint is that there's been a ravenous, preying, stalking personality here. This is a first offense. This is a first offense for our son. The first of this magnitude to come before us and before the State. So I

believe under 17.224 that we have then for your Honor to say, well, instead of incarceration the cure here obviously is a treatment. So that's what we're praying for, with a P R A Y. We're praying for that fervently that you in your decision. . . .

Well, having said all that, as I indicated, I've stood before many judges in the state as a pastor rather than as a father from issues of people stealing Christmas trees to alleged attempts to buy machine guns from Federal Agents and blow up the New Haven Police Department and everytime that I've stood before a judge pleading in someway for mercy, for leniency, there's those judges who give you the sense that all they want to hear is the State and their recommendation. There are those judges who with a heart of understanding, a heart of this—again a renaissance spirit—will see the issue and this is what we're praying for, your Honor. We have right now a team of clergy in Darien and Stamford praying about this whole issue; that Pharaoh's heart, the State, the Court, may be warmed when you see the issue at hand and that is rehabilitation and only one final point. This is the final issue. I feel that, I appreciate your time on this, but I feel that in Phillipians Fourth, there's a comment by St. Paul that says: "Whatsoever is honorable? Whatsoever is just. Whatsoever is true; Whatsoever is of good or bad." Think on these things, that is what my wife and I solely beg this court to do.

We understand as a father you read these terrible tales that are in the papers today of the recidivist; most of those recidivists have been through the prison system time and time again and it only adds to the horrendous thing that's going on in our society. People preying and opposing other people as my son obviously did, as he confessed, with this young lad. This again, your Honor, is a letter that's before you that is from Rev. Clark: Craig has a desirable environment in which to live on the outside. In addition, Craig has been involved almost from the time of the crime in an effective program of therapy and rehabilitation during which time he's even learned a useful trade. This is a person who's working in a county jail counselling persons who are truly detached in many ways from society. I would suggest that we're now squarely looking at the issue of rehabilitation vs. retribution and that's the blood angle, not just the pound of

flesh, but the blood angle as well. Incarceration would indeed satisfy retribution but could the State afford or supply any kind of on-going therapy that could be as effective as that in which he's already involved. In fact, a disrupted therapeutic relationship at this time might be extremely damaging to the future recovery and wholeness of Craig. I'm hopeful that the Court will take the time to see and assess Craig and many others like him as a human being and, your Honor, I appreciate the time. I did not know just what to anticipate in the way of time but I do have to share one personal comment and this may truly upset the State but I cannot help but share it with you. I felt that there's a lot of stonewalling that was going on in this case by the State. When Craig was initially arrested the charges—for example the second—the charge of the second degree Kidnapping was not upon the dossier, it was Unlawful Restraint, but when it moved over into Bridgeport it suddenly became second degree Kidnapping which certainly compounds the elements and intensity of the crime, but I have felt right from the very beginning, and we understand the feelings of the State, they stuck with the case, which is beautiful and their anxiety I can see it because of the terrible sex crimes and the rest that are going on in today's society, but still, your Honor, I could not help but wonder about the openness of the State with regard to this particular case, considering who the State's Attorney is; I've had a feeling for some time that with Mr. Brown—and I do not know Mr. Maco—and the feverency in which they're pursuing this case, it's as if it were a second, third or fourth offense. Then it brought to my mind, well, perhaps the diligence and fervency is because I have been active politically and socially in the Stamford community through a committee and the rest; we've been here to see Judge Levine four or five years ago about some of the inactivity on the part of the State's Attorney; and I realize—

THE COURT: I don't know anything about it. I'm not sure that it's going to aid or in any way help me in deciding what is to happen with your son today. I don't know if I was on the bench at that time.

REV. DAVIS: Well, Judge Levine was. We came here because of alleged municipality corruption and police corruption

in Stamford and we called to the governor and also wrote to the governor and also to Judge Levine who is apparently one of the top judges at the time. I got to express this publicly; I have the deep feeling in some way is this desire to close the wall and send him onto the warehouse relationship in Somers. There's been no humanity is what I'm saying, from the part of the State and this disturbs me deeply.

THE COURT: Anything else, sir?

REV. DAVIS: Makes me suspicious.

THE COURT: I don't want to cut you off but I really don't know how that is going to help me today with what I have to do and that is to make a difficult decision.

REV. DAVIS: We're relying upon you because you hopefully are the one with the spirit. The State, whether it's in our country, which is the greatest in the world, or the State throughout the world, the State always wants its pound of flesh and if possible its blood. All we're asking you to do is the pound of flesh has been removed, Craig has this for the rest of his life upon him, there's no way that it will ever been removed or rather replaced, that pound of flesh. Please, your Honor, please, spare the blood and I hate to make predictions with this kind of a crime, you know, everybody in this courthouse knows that this young man virtually stands with no chance at all within the prison system of this State or any other State because of the nature of the crime.

MRS. DAVIS: I too, your Honor, ask for mercy for Craig. He did a terrible thing and he's very sorry, and so are we, but Craig he needs out-patient treatment and not to be in a prison; that won't help him at all. Craig's been the most loving of all our sons; he'd go out of his way to do anything for anyone and this is what people tell us, that he's such a helping, trusting, wonderful person and I beg for mercy for Craig.

THE COURT: Thank you. Anything further, Mr. Bingham?

MR. BINGHAM: Yes, your Honor, just one thing briefly. As you know I've practiced before this court for many, many years

and I know the State's Attorneys in their ability to perform their duty, sometimes a very difficult duty and I must in view of some of the statements made by Rev. Davis come forward to say that I know Mr. Maco, it's not out of vengeance that he does it, he's a sworn officer of the law, he has to perform his duty as dictated to him by the Statutes. I have to perform my duty as defense counsel and as dictated by the Canons of the Bar, by the Canons of justice which both Mr. Maco and I understand and I wish to say I know Mr. Brown and I've known him for many years, even before he was a State's Attorney and any relationship, personal relationship, that he may have had with any member of this family would absolutely not effect him in one way at all. As a matter of fact, I know that Mr. Brown has not participated in this case at all and therefore he cannot be or could anybody point a finger at him saying that this is the one we're prosecuting and the next one we're not prosecuting. In no way is there any accusation of that, your Honor.

THE COURT: Thank you. The Court obviously must make the final decision.

MR. BINGHAM: One other thing. You ruled and on 17-245 obviously the defendant does not waive the hearing under 17-245; I know that the Statute is inconsistant in my belief anyway.

THE COURT: I understand you wish the record to be perfected. It certainly should indicate your remarks. This is a difficult decision, obviously. There are those persons in the courtroom who sometimes look at a single side of the issue. Defense attorneys sometimes; State's Attorneys sometimes; victim's families; defendants; spectators and others. It's easy for them. It's easy for you all. It's not easy for me, because I've got to make the decision. A decision in all likelihood which will be second-guessed or if I can use a Super Bowl term "Monday morning quarterbacked" for a period of time. I don't mind that. That's my job; that's what I will do and I will continue to do so, calling each case one by one as I see them. No amount of pressure nor heat nor anything else will change that. I took an oath to do so and I will forever, forever keep that oath.

This is a case where both sides in my opinion are unrealistic. There is no question that this young man must be incarcerated,

no question whatsoever. I have reviewed all of the documents; I've read them rather carefully, including at five a.m. this morning when I began to prepare for today's work. There was a statement in one of the reports which struck me and that was that no matter how much counseling and treatment this young may may receive the doctor could not accurately predict whether or not he would repeat this terrible offense. For that reason alone, if for no other, he must be incarcerated.

The State is asking for a term in prison which would make the Court—if it were to be followed—would make the Court order consecutive sentences for what is basically a single incident. This is a young man who has no prior convictions, none whatsoever. This is a young man who has subjected himself to the mercy of the Court knowing full well that he could be sentenced to a period of incarceration as long as one he would be likely to receive if he had gone to trial.

I don't doubt that he is at this time remorseful. I don't even have much doubt that he was remorseful immediately following the event, but that's not really the question. I don't have much doubt that he has been hurt by this incident; that he, himself, is a victim, and that his parents are victims, but that in no way compares to the hurt of the young boy in question or his family. There is no comparison. As Mr. Maco said when he spoke, he told the parents that he wouldn't even presume to them that he knew how they felt. I share that belief with Mr. Maco. This was a vicious, and brutal attack. He must be penalized and I intend to penalize him to the maximum that I feel is possible under the Statutes of the State of Connecticut. I don't believe that this calls for consecutive sentences. I will impose all of the sentences concurrent to one another.

Mr. Davis, it will be a long sentence. I have no alternative. I hope that while you are incarcerated you, in fact, receive the psychiatric counseling that I intend to order—intend to recommend, I should say—to the Commissioner of Corrections.

There are three counts. On the count of Kidnapping in the second degree and Sexual Assault first degree the accused is committed to the custody of the Commissioner of Corrections

for no less than ten no more than 20 years to serve; on the count of Robbery in the third degree, the accused is committed to the custody of the Commissioner of corrections for no less than two no more than five years to serve. As previously indicated all concurrent. Net effective sentence no less than ten no more than 20 years to serve.

MR. BINGHAM: Did I understand your Honor correctly that there was either an instruction or a recommendation that—

THE COURT: As best I can impose the following recommendation and if the Commissioner will treat it as an instruction I would be grateful: That he be given psychiatric counseling and treatment and that he be housed at Whiting if that's possible, but the sentence is nontheless no less than ten no more than 20 years to serve.

MR. BINGHAM: All rights of appeal will be reserved within the Statute, if your Honor, please?

THE COURT: Yes.

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27,812	JUDICIAL DISTRICT OF FAIRFIELD
STATE OF CONNECTICUT	SUPERIOR COURT
vs.	AT BRIDGEPORT
CRAIG M. DAVIS	JANUARY 22, 1982

CERTIFICATION

This is to certify that the within and foregoing is a true and accurate transcript of the stenographic notes taken by me in the above-entitled case, held at the Superior Court, Judicial District of Fairfield, 1061 Main Street, Bridgeport, Connecticut, on January 22, 1982, before the Honorable Aaron Ment.

Dated this 3rd day of February, 1982, at Bridgeport, Conn.

/s/
Janice G. Healy
Court Reporter